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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 591

JOSEPH IACULLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a-15a; R. 54-64) is reported at 226 F. 2d 788.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1955 (Pet. 15a; R. 65), and a petition for rehearing was denied on November 25, 1955 (Pet. 15a; R. 66). The petition for a writ of certiorari was filed on December 27, 1955. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient independent evidence of petitioner's participation in the conspiracy charged in the indictment to justify the admission in evidence against him of declarations by co-conspirators.

2. Whether the court properly admitted testimony as to events which occurred after the last overt act charged in the indictment, where these events preceded the arrest of any of the defendants and there was no evidence tending to show an earlier termination of the conspiracy.

STATEMENT

Seven counts of a sixteen-count indictment returned on February 28, 1955, in the United States District Court for the Northern District of Illinois charged petitioner and others [1] with a conspiracy from about July 16, 1953, to March 16, 1954, to violate federal narcotics laws (count 16) and with substantive narcotics violations on July 23, October 14, and December 9, 1953 (R. 6-23).[2] Petitioner, who waived his right to a trial by jury (Tr. 45), was con-

[1] The indictment named Anthony Schullo, Anthony Sperna and Anthony Ponzi as defendants and Frank Coduto and Anthony Pape, who were killed subsequent to the events in question (Tr. 502, 503), as co-conspirators (R. 6-23). None of the co-defendants were tried with petitioner. Sperna and Schullo pleaded guilty to the substantive counts, and the court dismissed the conspiracy counts as to them. Ponzi's trial was severed.

[2] The designation "R." refers to the record on appeal, and the designation "Tr." to the typewritten transcript of the trial proceedings.

victed on all seven counts and sentenced to concurrent terms of imprisonment of five years on each count and to a fine of $100. (R. 33). Upon appeal, the judgment of conviction was affirmed (R. 65).

The evidence adduced by the government may be summarized as follows:

About 6:30 p. m. on July 23, 1953, Frank Coduto told federal narcotics agent Harry Mattera, in response to the latter's request to purchase heroin, to accompany him to a nearby drugstore where, Coduto said, he would have "to give the fellows a call." After agent Mattera gave Coduto the purchase price of $800 and the call was made, Coduto said that delivery would be made about 8:30 p. m. (Tr. 53, 54, 55, 56-57, 341-342) At that time Coduto rejoined agent Mattera and told him that the delivery would be made shortly (Tr. 343). Within a few minutes a car driven by Sperna, accompanied by petitioner, drove up to agent Mattera's car, which was parked nearby. Coduto said "There they are now." Sperna threw a package toward Mattera's car and drove away, but maintained observation of the area for a few minutes. (Tr. 55, 56, 57, 104-107, 159-163, 343-344.) Mattera picked up the package, which was wrapped in newspaper. It contained two envelopes which upon analysis were found to contain heroin. (Tr. 63, 323-324, 373, 374)

On August 13, 1953, Coduto refused Mattera's request to purchase more heroin "because the fellows were out of town." When Mattera asked what fellows he meant, Coduto replied "The fellows that

were in the car the other day, the other time" (Tr. 344-345).

On September 18, 1953, about 7:30 p. m., Mattera gave Coduto $800 for heroin. Later that evening Mattera went to a restaurant where he saw Anthony Schullo, who made a call and left. Within about fifteen minutes, Coduto entered and gave Mattera a package wrapped in newspaper. It contained an envelope which upon analysis was found to contain heroin (Tr. 141-142, 145-147, 189-191, 325). On the newspaper was one of petitioner's fingerprints (Tr. 243).

On October 13, 1953, Mattera, who was seated with Coduto and Schullo in a drugstore, told Coduto that he was dissatisfied with his business methods. Schullo said that he would thereafter take care of Mattera's needs. Mattera then asked for narcotics. Schullo made a phone call from the drugstore and informed Mattera that "his connection" would arrive about 9:00 p. m. (Tr. 345-347) About 8:45 p. m. Mattera saw Anthony Pape leave the drugstore (Tr. 347). Schullo left immediately thereafter and returned within about five or ten minutes (Tr. 348).

About 9:00 a. m. the following morning, Mattera met Coduto and Schullo at the same drugstore and gave Schullo $800. Coduto went with Mattera in his car to a service station, and Schullo followed them in his car. At the service station, the three left their cars and Mattera went into the washroom where he found a package which upon analysis was found to contain heroin. (Tr. 66-68, 312-315, 324.) Mattera departed alone in his car. Schullo drove

off with Coduto, dropped Coduto off, and was joined by petitioner. After talking for a few minutes, Schullo and petitioner drove off, parked near Sperna's house, and talked for about 10 to 15 minutes. When Sperna came out, petitioner left the car, talked to him, and then waved to Schullo, who drove away. Petitioner and Sperna went to a nearby luncheonette which they frequented. (Tr. 315-317.)

Mattera talked to Anthony Pape for the first time on November 28, 1953. On December 9, 1953, after a telephone conversation with Pape, Mattera met him and received from him a package wrapped in a newspaper for which Mattera paid $1650. (Tr. 75-78.) Upon analysis the package was found to contain heroin (Tr. 324-325). Fingerprints on the newspaper were identified as petitioner's (Tr. 217-219, 224-225).

None of the narcotics which Mattera purchased bore the requisite federal stamps nor did the purchaser present the requisite Treasury form for the purchases (Tr. 63-64, 73-74, 80, 149).

On February 18, 1954, Sperna drove with petitioner to the building where Pape lived. Petitioner entered the building, left within five to ten minutes, and drove away with Sperna. About ten or fifteen minutes later Pape left the building. (Tr. 94-95.)

On March 16, 1954, petitioner, his co-defendants and the alleged co-conspirators were arrested. A search of Pape's apartment revealed heroin and heroin paraphernalia. (Tr. 97-98, 471-473, 476.)

Petitioner testified that he at no time had any knowledge or dealings of any kind concerning nar-

cotics (Tr. 439) and that his presence with Sperna on July 23, 1953, was merely to take a ride with Sperna at Sperna's request (R. 440-441). His fingerprints on the newspaper, he explained, were probably placed there when he glanced over the newspapers at the corner candy store which he and Sperna frequented, or when he purchased papers from a paralytic newsboy and returned them to him when he finished so that the boy could resell them (Tr. 443).

ARGUMENT

1. Seeking further review of the concurrent findings of both courts below, petitioner contends that the evidence *aliunde* failed to establish a *prima facie* showing of his participation in the conspiracy, so that it was error to admit against him evidence of Coduto's statements to Mattera on July 23 and August 13, 1953.[3] But petitioner's undisputed association with the known conspirators on two occasions when the narcotic sales were negotiated—with Sperna on July 23 and with Coduto, Schullo and Sperna on October 14 (see Statement *supra*, pp. 3, 4-5)—indicated more than innocent association, particularly in light of the additional undisputed evidence that petitioner's fingerprints appeared on the newspapers with which the narcotics sold on September 18 and December 9

[3] *I.e.*, the statement "there they are now" when petitioner and Sperna drew up to Mattera's car on July 23, and the statement on August 13 that Coduto could not furnish heroin because the "fellows that were in the car the other day, the other time" were out of town (Tr. 343-345), *supra* pp. 3-4.

were wrapped. Any one of these facts alone might perhaps be explained away as coincidence, but the combination of all is not subject to such an explanation. Petitioner's association with the conspirators at the time the sales were made and his fingerprints on two different occasions on the particular newspaper in which the narcotics were wrapped comprise a very different picture from that involved in *United States* v. *Di Re*, 332 U.S. 581, where the defendant on a single occasion accompanied "a criminal to a crime rendezvous" (*id.* at 593).

Although no jury was sitting in the case, the court carefully did not admit in evidence or even hear any of the declarations in question until after the admission of the evidence which has just been outlined and after he had made a determination that this independent proof justified an inference of petitioner's knowledge of and membership in the conspiracy. His conclusion that the independent evidence was sufficient to justify admission of the declarations, and that altogether the evidence established petitioner's guilt beyond a reasonable doubt, is supported by the record and presents no issue for review by this Court.

2. Petitioner urges (Pet. 9-11) error in the court's admission in evidence of the events of February 18, 1954,[4] on the ground that they occurred subsequent to the last overt act, on December 9,

[4] *I.e.*, petitioner's' presence on this date in the building in which Pape, a known conspirator, lived and where heroin and narcotic paraphernalia were subsequently found. See Statement *supra* p. 5.

1953, which was charged in the indictment. It is well settled, however, that a conspiracy may be a continuous offense until its purpose has been consummated or until it is abandoned. See *Brown* v. *Elliott*, 225 U.S. 392, 400; *United States* v. *Kissel*, 218 U.S. 601, 607-608; *Bellande* v. *United States*, 25 F. 2d 1, 2 (C.A. 5), certiorari denied, 277 U.S. 607. And in proving a conspiracy the government is not confined to the overt acts charged in the indictment. *United States* v. *Downing*, 51 F. 2d 1030, 1031 (C.A. 2); *Meyers* v. *United States*, 36 F. 2d 859, 860 (C.A. 3), certiorari denied, 281 U.S. 735. The instant case involved a continuing conspiracy to sell narcotics, and there was no evidence that it had been abandoned before the arrest of the conspirators on March 16, 1954, the date alleged in the indictment as the termination date. Absent evidence of abandonment, the presumption is that the conspiracy continued in existence. *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C.A. 3), certiorari denied, 316 U.S. 678; *Nyquist* v. *United States*, 2 F. 2d 504 (C.A. 6) certiorari denied, 267 U.S. 606; *Remus* v. *United States*, 291 Fed. 501 (C.A. 6). Accordingly, the February 18 events were properly admitted as evidence of the conspiracy.

Moreover, as petitioner himself observes, the evidence in question concerned "an innocuous event" (Pet. 9). As we have shown in the preceding point (pp. 6-7, *supra*), the independent evidence demonstrating *prima facie* petitioner's implication in the conspiracy, laying a basis for the evidence of his co-conspirator's statements, was primarily evidence

of his direct implication in the unlawful transactions. Though mentioned by the Court of Appeals (Pet. 12a), and properly held admissible, the proof of petitioner's visit with Sperna to the building where Pape was present on February 18, 1954, was in itself a minor aspect of the case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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